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No. 97-761

In the Supreme Court of the United States

October Term, 1997

ELIZABETH WEAVER AND ROY VARNER, PETITIONERS

v.

HARVEY WOOD, ET AL., RESPONDENTS

On Petition For Writ Of Certiorari To The Supreme Judicial Court For The Commonwealth Of Massachusetts

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Massachusetts Supreme Judicial Court's ruling that petitioners have no "personal right" sufficient to support standing to sue under Massachusetts law is reviewable in this Court.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

STATEMENT 1

A. Background 1

B. Petitioners' Complaint 5

C. Dismissal of the Complaint for Want of Standing . . 7

REASONS WHY THE PETITION SHOULD BE DENIED 11

I. The Federal Constitutional Questions Were Neither Properly Raised By Petitioners In The Court Below Nor Addressed By That Court In Its Opinion. . . 13

II. The Constitutional Questions Raised By The Petition Are Entirely Spurious. 18

III. Prudential Considerations Also Caution Against Granting The Petition. 22

CONCLUSION 29

TABLE OF AUTHORITIES

Cases: *Page*

Ames v. *Attorney General*, 124 N.E.2d 511 (Mass. 1946) 10

Adams v. *Robertson*, 117 S. Ct. 1028 (1997) 11, 13-14, 16-18

Assessors of Boston v. *Lamson*, 55 N.E.2d 215 (Mass. 1944) 4

Atlas Tack Corp. v. *DiMasi*, 637 N.E.2d 230 (Mass. App. 1994) 15

Axelrod v. *Board of Assessors*, 466 N.E.2d 517 (Mass. 1984) 15

Basich v. *Board of Pensions*, 540 N.W.2d 82 (Minn. App. 1995) 27

Beck v. *Washington*, 369 U.S. 541 (1962) 15

Board of Dirs. of Rotary Int'l v. *Rotary Club of Duarte*, 481 U.S. 537 (1987) 14-18

Carl J. Herzog Found. v. *University of Bridgeport*, 699 A.2d 995 (Conn. 1997) 23

Chase v. Dickey, 99 N.E. 410 (Mass. 1912) . 10, 17, 22

Commissioner of Correction v. *McCabe*, 576 N.E.2d 654 (Mass. 1991) 14, 15

Commonwealth v. *Doe*, 544 N.E.2d 860 (Mass. 1989) 16

TABLE OF AUTHORITIES-Continued

Page

Corporation of Presiding Bishop v. *Amos*, 483 U.S. 327 (1987) 27

Crocker v. *Stevens*, 435 S.E.2d 690 (Ga. App. 1993) 24

De Long, In re, 565 N.Y.S.2d 569 (App. Div. 1991) 23

Dillaway v. *Burton*, 153 N.E. 13 (Mass. 1926) . . . 7, 21

Dittemore v. *Dickey*, 144 N.E. 57 (Mass. 1924) . . 10, 22

E.H.S. v. *K.E.S.*, 676 N.E.2d 449 (Mass. 1997) . 14, 15

Eustace v. *Dickey*, 132 N.E. 852 (Mass. 1921) 3, 10, 17, 22

Exxon Corp. v. *Eagerton*, 462 U.S. 176 (1983) 13

Gray v. *St. Matthews Cathedral Endowment Fund, Inc.*, 544 S.W.2d 488 (Tex. Civ. App. 1976) 24, 25

Hardman v. *Feinstein*, 240 Cal. Rptr. 483 (App. 1987) 23

Hill v. *California*, 401 U.S. 797 (1971) 13

Hinton v. *City of St. Joseph*, 889 S.W.2d 854 (Mo. App. 1994) 23

Jones v. *Wolf*, 443 U.S. 595 (1979) 26

TABLE OF AUTHORITIES-Continued

Page

Kedroff v. *St. Nicholas Cathedral*, 344 U.S. 94 (1952) 13, 25, 28

Krauthoff v. *Attorney General*, 132 N.E. 865 (Mass. 1921) 10, 17, 22

Lemon v. *Kurtzman*, 403 U.S. 602 (1971) 27

Lopez v. Medford Community Center, 424 N.E.2d 229 (Mass. 1981) 7, 10, 19, 20, 23

M.L.B. v. *S.L.J.*, 117 S. Ct. 555 (1996) 20

Michel v. *Louisiana*, 350 U.S. 91 (1955) 13

Moloney v. *Boston Five Cents Savings Bank FSB*, 663 N.E.2d 811 (Mass. 1996) 15

Mt. Jezreel Christians Without A Home v. *Board of Trustees*, 582 A.2d 237 (D.C. 1990) 24

Nacol v. *Texas*, 792 S.W.2d 810 (Tex. App. 1990) . . 23

Presbyterian Church v. *Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969) 25

PruneYard Shopping Center v. *Robins*, 447 U.S. 74 (1980) 17

Rizzuto v. *Rematt*, 653 N.E.2d 34 (Ill. App. 1995) . . 27

Royal Indemnity Co. v. *Blakely*, 360 N.E.2d 864 (Mass. 1977) 14

TABLE OF AUTHORITIES-Continued

Page

Serbian Eastern Orthodox Diocese v. *Milivojevich*, 426 U.S. 696 (1976) 13, 26, 28

Sugarman v. *Board of Registration*, 662 N.E.2d 1020 (Mass. 1996) 15, 16

United Church of God, Inc. v. *McLendon*, 344 S.E.2d 373 (N.C. App. 1986) 24

Statutes and Rule:

28 U.S.C. § 1257 13

Mass. Gen. Laws ch. 12, § 8 . . . . . 7, 9

S. Ct. Rule 14.1(g)(i) 14

Miscellaneous:

Mary Baker Eddy, *Church Manual* . . . . . *passim*

Mary Baker Eddy, *The First Church of Christ Scientist and Miscellany* (1913) 3

Restatement (Second) of Trusts (1959) 10, 23

IV A Austin W. Scott & William F. Fratcher, *The Law of Trusts* (4th ed. 1989) 10, 23

Robert L. Stern, et al., *Supreme Court Practice* (7th ed. 1993) 13, 17

Laurence H. Tribe, *American Constitutional Law* (2d ed. 1988) 25

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents, who are present or former directors, trustees, or officers of The First Church of Christ, Scientist, or of its publishing arm, The Christian Science Publishing Society, respectfully request that this Court deny the petition for a writ of certiorari.

STATEMENT

In this case two individual members of The First Church of Christ, Scientist ("the Church"), asked the civil courts of the Commonwealth of Massachusetts to intervene in the internal affairs of the Church. They sought declaratory and injunctive relief, and a judicial accounting of Church finances, on the theory that expenditures made by the Church's Board of Directors for the purpose of communicating the Church's message to the world were in violation of the divinely inspired governing documents of the Church written by Mary Baker Eddy, the Discoverer of Christian Science and the Founder of the Church.

The Supreme Judicial Court of Massachusetts ordered dismissal of petitioners' suit. It held, under "well-settled principles" of Massachusetts law governing all churches and charities, that "only the Attorney General can bring an action alleging the misuse of charitable assets" (Pet. App. 3a, 8a), and that a church member has no standing to sue except when "the claim has arisen from a personal right that directly affects the individual member." Pet. App. 9a. The court examined the allegations of the complaint and the governing documents of the Church and concluded, *solely on the basis of state law*, that these petitioners have no such "personal right" and therefore have no standing to bring this case. That state law ruling is not reviewable in this Court.

A. Background

Mary Baker Eddy established the Church in 1879 in Boston, Massachusetts. The governing structure of the Church is set forth in three documents, written by Mrs. Eddy

and understood by Christian Scientists to be divinely inspired. Pet. App. 4a n.6. These documents are the *Church Manual*, which includes the Rules and By-Laws of the Church; an 1892 Deed of Trust, specifying requirements for the building and use of a church edifice and the creation of The Christian Science Board of Directors (the "Board of Directors"); and an 1898 Deed of Trust, establishing The Christian Science Publishing Society (the "Publishing Society").[1/] The Church, which has hundreds of thousands of members worldwide, is governed under the *Manual* by a self-perpetuating Board of Directors, whose appointments, succession, and authority are traced back to original appointments made by Mrs. Eddy in the nineteenth century. Joint App. 318-319, 372.

Contrary to petitioners' assertion (Pet. 6) that Church members have "personal rights * * * to participate in the governance of the church," under the *Church Manual* individual Church members have no right to vote for the Directors or other officers of the Church or its Publishing Society, or to participate in their decisions. The *Manual* establishes for the Church a unique governing structure that bears no resemblance to a "congregational" form of governance. Article XXIII, § 3; Article XXXV, § 1. For example, the *Church Manual* specifies that annual meetings of the

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[1/] The petition contains misstatements of fact and mischaracterizations of the Church's governing structure too numerous to respond to in this brief. The deeds of trust and *Church Manual* are contained in the Joint Appendix filed in the Supreme Judicial Court (cited herein as "Joint App."). The meaning of these foundational documents is authoritatively described in an affidavit filed by The Christian Science Board of Directors (also included in the Joint Appendix). For the convenience of the Court, respondents have lodged with the Clerk copies of the Board of Directors' affidavit, as well as copies of the Complaint and of the briefs that the parties filed in the Supreme Judicial Court.

Church "shall be for listening to the reports of Treasurer, Clerk, and Committees, and general reports from the Field." Article XIII, § 1. "No other than [the Church's] officers are required to be present." *Ibid.*

Although the *Church Manual* does give members of the Church privileges and responsibilities, such as the privilege to form a Christian Science organization at a university or college (Article XXIII, § 8) and the duty to inform the Board of Directors of any perceived failures by the Directors or other officers to discharge their duties (Article I, § 9), the *Manual* does not give members any decisionmaking authority over the management, operations, or policies of the Church or its Publishing Society. Those matters are entrusted to the final decision of the Board of Directors. Pet. App. 4a-5a.

As recognized by the Supreme Judicial Court in this case, under the *Church Manual* Mrs. Eddy designated The Christian Science Board of Directors as the final religious, administrative, and judicatory body within the Church organization. See, *e.g.*, Pet. App. 4a-5a; Joint App. 317; *Eustace* v. *Dickey*, 132 N.E. 852, 857 (Mass. 1921) ("the entire management has passed into the hands of the directors, a self-perpetuating body, all this at the suggestion and with the approval of Mrs. Eddy"). Article I, § 6 of the *Manual* vests authority in the Board of Directors alone to transact the business of the Church. Article I, § 9 empowers the Board to ensure that Church operations are conducted by its officers in compliance with the *Manual*. Mrs. Eddy specifically wrote that "[a]ll" inquiries from Church members which relate "in any manner" to infractions of the *Manual* are to be addressed to The Christian Science Board of Directors. Mary Baker Eddy, *The First Church of Christ Scientist and Miscellany* 223 (1913).

From the earliest days of the Church, publication of certain periodicals—including the Pulitzer-prize winning newspaper *The Christian Science Monitor*, founded by Mrs.

Eddy in 1908—has been a central part of the Church's worldwide mission. Pet. App. 6a; see *Assessors of Boston* v. *Lamson*, 55 N.E.2d 215, 217-218 (Mass. 1944) (recognizing the religious nature of the *Monitor* and the activities of the Publishing Society). The Church has provided substantial funds to its Publishing Society for capital needs and mission activities. See Joint App. 344 (Church funding for publication of the *Monitor* has ranged from 5 million to 20 million dollars a year over the past 20 years). Beginning in 1985, after years of careful study, the Board of Directors initiated a program to expand the Church's periodicals into new print and broadcast media, including a monthly magazine, television, radio, and cable. Petitioners describe this expansion of the Church's publishing activities as if it were undertaken for the purpose of financial gain rather than to further the Church's mission. Pet. 11-13. The Board of Directors, however—responding to the mandate of the *Church Manual* that the Board "see that [the Church's] periodicals are ably edited and kept abreast of the times" (Article VIII, § 14)—determined that the expansion would advance the Church's religious interests and the Publishing Society's mission to promote and extend the religion of Christian Science. Joint App. 317, 345-353.

The Church won many national awards and wide acclaim for the quality of its expanded programs (Joint App. 618-625), but the cost and nature of these operations made them controversial among some members. Eventually, the Church and Publishing Society discontinued most of the new operations in 1992. Pet. App. 6a. At that time, in addition to the regular and usual financial reports presented at annual meetings, the Church prepared and distributed a detailed report on all publishing and broadcasting expenditures over the eight-year period ending in 1992. The Church also made available to members financial statements, audited by Ernst & Young, for fiscal years ending in 1992, 1993, and 1994. This information went far beyond the financial disclosure

required by the *Church Manual*, which mandates only that the Board of Directors report at the annual meeting "the amount of funds which the Church has on hand, the amount of its indebtedness and of its expenditures for the last year." Article XXIV, § 3. The audited financial statements for fiscal 1994, which are part of the record, show that the Church maintained a substantial net worth, its income exceeded expenditures by approximately $12 million, and it had no external liabilities (other than equipment lease and note obligations of $800,000). Joint App. 563-616.[2/]

B. Petitioners' Complaint

In December 1993, after most of the expanded publishing and broadcasting operations had been discontinued and the financial reports provided, two individual Church members—who have no right under the *Church Manual* to participate in any decision on any issue of Church governance, financial management, or publishing policy—brought this suit in Superior Court. The complaint sought a judicial determination that the Directors had mismanaged Church funds and a permanent injunction to restructure the internal governance of the Church. The "Concise Statement of the Facts" filed by petitioners in the Superior Court stated, in its entirety:

> This is an action by members of The First Church of Christ, Scientist, in Boston, seeking injunctive relief,

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[2/] At the June 1997 annual meeting, the Treasurer reported that the Church had $251 million on hand as of April 30, 1997—an increase of $23 million over the previous fiscal year. External indebtedness amounted to $2 million (comprising capital leases on operating equipment), and operating and capital expenditures were $75 million. The total net worth (net assets) of the Church was $485 million. These figures are a matter of public record. Audited financial statements for fiscal years 1995, 1996, and 1997 have also been made publicly available by the Church.

> declaratory relief and an accounting from the Church Directors and others for claimed mismanagement of funds in connection with media ventures.

Joint App. 38. The complaint contained no allegation that the defendants had denied petitioners any personal rights to which they were entitled. Count I of the complaint alleged that the Committee on Finance (a committee on which neither petitioner ever served) had not been permitted to perform its proper functions. Joint App. 32-33.[3/] Count II alleged that the Board had not acted with the "wisdom, economy, and brotherly love" required under the *Church Manual*. *Id.* at 33.[4/] Count III alleged that the expanded communications program constituted an investment for "speculative purposes" and that the Publishing Society trustees had incurred "liability beyond their ability to liquidate promptly from current income." *Ibid.* Count IV prayed for a judicial accounting of Church finances, above

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[3/] Article XXIV, § 4 of the *Church Manual* provides for a Committee on Finance, whose three members are appointed annually by the Board of Directors. The *Manual* requires that "[p]rior to paying bills against the Church, the Treasurer of this Church shall submit them all to [the Committee on Finance] for examination. This committee shall decide thereupon by a unanimous vote, and its endorsement of the bills shall render them payable." Petitioners did not allege that any bills were not submitted to the Committee on Finance, nor that any bills were paid without unanimous vote and endorsement by the Committee. Rather, this count of the complaint was based on the theory that in addition to examining the bills and verifying them for payment, the Committee on Finance should have been given a veto authority over the spending decisions and priorities of the Board of Directors and even the power to remove Directors from office. Complaint, ¶¶ 26-27, 96, 100, Joint App. 15, 31-32.

[4/] Count II was dismissed by the Superior Court (Pet. App. 28a), and petitioners did not appeal that ruling.

and beyond the annual report required by Article XXIV, § 3 of the *Church Manual*. *Id.* at 34. The complaint did not allege that the Directors had failed to provide the Article XXIV report, but was based on the theory that the court should require additional reporting in the interest of "good governance." Plaintiffs' Mem. in Opposition to Motion for Summary Judgment 16, Joint App. 171.

C. Dismissal of the Complaint for Want of Standing

Respondents moved to dismiss the complaint for lack of standing, contending that under Massachusetts law only the Attorney General has standing to bring suit to ensure sound management of charitable organizations, including churches. Defendants' Mem. in Support of Motion to Dismiss 8-18; see Mass. Gen. Laws ch. 12, § 8; *Dillaway* v. *Burton*, 15[illegible] N.E. 13, 15-16 (Mass. 1926); *Lopez* v. *Medford Community Center*, 424 N.E.2d 229, 231-234 (Mass. 1981). Respondents subsequently moved for summary judgment on the same ground. Defendants' Mem. in Support of Motion for Summary Judgment 21-27, Joint App. 140-146.[5/] This was the same argument, based on the same authorities, that would ultimately inform the decision of the Supreme Judicial Court. In responsive memoranda, petitioners addressed the standing point in detail, making arguments based solely on Massachusetts law. Plaintiffs' Mem. in Opposition to Motion to Dismiss 17-21; Plaintiffs' Mem. in Opposition to Motion for Summary Judgment 10-19, Joint App. 165-174. If petitioners believed that acceptance of respondents' standing argument would violate the United States Constitution, they had every opportunity to make the argument. They did not do so.

[5/] Respondents also contended that adjudication of petitioners' claims would be barred by the religious freedom guarantees of the Massachusetts and United States Constitutions. See *infra*, pages 25-28.

In a ruling based on Massachusetts law, Justice Flannery of the Superior Court denied respondents' motion to dismiss, holding that "[a]lthough these breaches [alleged by the complaint] relate to the proper administration of church funds, the interests of the individual plaintiffs in the enforcement of the by-laws are distinct from the interests of the general public." Pet. App. 30a. Similarly, in denying respondents' motion for summary judgment, Justice Volterra ruled on state law grounds that although "the issues raised by [the complaint] deal with the governance of the Mother Church,"[6] petitioners suing "as members" "are lawfully entitled to seek judicial redress to insure that the defendant trustees comport themselves in accordance with the dictates of the wills, trusts, and Manual of Mrs. Eddy." Pet. App. 14a-15a.[7]

On interlocutory appeal to the Supreme Judicial Court, respondents reiterated their argument that petitioners lacked standing to sue under Massachusetts law. Petitioners again responded by disputing respondents' interpretation of Massachusetts precedents. In neither their statement of issues, their summary of argument, nor the body of their brief did petitioners make any claim that the United States Constitution or any federal statute is relevant to this issue of standing under state law. Only in the portion of their brief styled "Conclusion" did petitioners make an oblique, two-sentence reference to the First Amendment's Free Exercise and Establishment Clauses. Brief for Plaintiffs-Appellees, at 49-50. Nowhere in their brief did petitioners even mention

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[6] The First Church of Christ, Scientist, in Boston, Massachusetts, is also known as "The Mother Church."

[7] Both Superior Court judges also rejected respondents' argument that trial of the suit would violate the First Amendment and the cognate provisions of the Massachusetts Constitution.

the Fourteenth Amendment's Due Process and Equal Protection Clauses.

In a unanimous ruling, the Supreme Judicial Court of Massachusetts vacated the ruling below, which had denied respondents' motion for summary judgment, and remanded with instructions to dismiss the complaint for want of standing. The court relied exclusively on Massachusetts law and Massachusetts precedents, and made no reference to any federal issue. The court first held that the Church is a "public charity" under Massachusetts law. Pet. App. 7a. "When a trust is charitable," the court observed, "the Legislature has determined that the Attorney General is responsible for ensuring that its charitable funds are used in accordance with the donor's wishes." Pet. App. 8a. In support of this ruling, the court cited Mass. Gen. Laws ch. 12, § 8 ("the attorney general shall enforce the due application of funds given or appropriated to public charities within the commonwealth and prevent breaches of trust in the administration thereof") and six prior decisions of the Supreme Judicial Court, including one decision more than a century old and another decision involving this very Church. Pet. App. 8a-9a. The court explicitly rejected the Superior Court's reasoning that members of a charity have standing simply because they have interests separate and distinct from those of the general public. Pet. App. 10a.

The court noted that it had "on occasion recognized a private plaintiff's standing to make claims against a public charity," but "[i]n each such case the claim has arisen from a personal right that directly affects the individual member, such as where the member has a right to exercise a vote in connection with some aspect of the charity's affairs (a right not present here) and is prohibited from doing so." Pet. App. 9a (citing Massachusetts decisions). In all such cases, the court explained, the plaintiff's claim was limited to the denial of the personal right, and did not extend to general "'claims

of corporate mismanagement.'" Rather, "it is 'the exclusive function of the Attorney General to correct abuses in the administration of a public charity.'" Pet. App. 9a, quoting *Lopez* v. *Medford Community Center, Inc.*, 424 N.E.2d 229, 232 (Mass. 1981), and *Ames* v. *Attorney General*, 124 N.E.2d 511, 514 (Mass. 1946).

Contrary to the petition (at i, 17, 19, 20, 21, 23), the Supreme Judicial Court did *not* hold that only church members with voting rights have standing to sue. Rather, the court held that individuals may sue only to vindicate their personal rights "*such as*" the right to vote. Pet. App. 9a (emphasis added). The court further held, based on its examination of the complaint and of the Church's governing documents, that petitioners had asserted no such "personal right." In particular, the court rejected petitioners' argument that they had standing to sue in order to enforce their own understanding of the *Church Manual* (citing *Krauthoff* v. *Attorney General*, 132 N.E. 865 (Mass. 1921)) or as "beneficiaries" of the 1892 or 1898 trusts or of Mrs. Eddy's will. Pet. App. 9a-10a. "We have reviewed the various instruments and conclude, as we have in the past, that individual members of the Church are not 'beneficiaries' in the sense that they have standing to enforce the provisions of the 1892 or the 1898 deeds of trust, or the terms of Eddy's will." Pet. App. 10a. The court cited three earlier decisions involving this Church, all reaching the same conclusion: *Dittemore* v. *Dickey*, 144 N.E. 57, 61 (Mass. 1924); *Eustace* v. *Dickey*, 132 N.E. 852, 860 (Mass. 1921); *Chase v. Dickey*, 99 N.E. 410, 411-412 (Mass. 1912). The court also cited the *Restatement (Second) of Trusts* and *Scott on Trusts* for these basic principles of state law. Pet. App. 11a.

In a petition for rehearing before the Supreme Judicial Court, petitioners for the first time articulated their current argument that this application of long-established standing law violates the United States Constitution. The petition for

rehearing was denied unanimously and without opinion. Pet. App. 32a.

REASONS WHY THE PETITION SHOULD BE DENIED

Under well-settled principles, addressed most recently in *Adams* v. *Robertson*, 117 S. Ct. 1028, 1029-1031 (1997), the decision of the Supreme Judicial Court is not reviewable by this Court because petitioners neither raised their federal claim in the state courts nor did the Supreme Judicial Court pass upon any federal issue. The Supreme Judicial Court discussed only Massachusetts principles of standing and cited only state law precedents. Whether petitioners have a personal interest sufficient to support standing to sue under Massachusetts law depends entirely on construction of the governing documents of the Church, which, petitioners concede (Pet. 2, 26-28), is a matter of Massachusetts law. See Pet. 26 ("the Deeds and Manual must be construed according to Massachusetts law"). Because no issue of federal law was raised by petitioners in Superior Court, or on a timely basis on appeal—and none was decided by the Supreme Judicial Court—the federal issue presented in the petition has not been preserved and this Court lacks jurisdiction to review that issue.

Even if this Court had jurisdiction, the petition should still be denied because it depends entirely upon a palpable misconstruction of the Supreme Judicial Court's decision. The jumble of constitutional claims asserted by petitioners rests on the notion that the Supreme Judicial Court held that standing turns upon "the *form* of personal right to participate in church governance." Pet. 21; see Pet. i, 19-24. But the Supreme Judicial Court held no such thing. It held that individual church members may sue only to vindicate personal rights, and that petitioners, who are not personal beneficiaries of Mrs. Eddy's trusts or will, have failed to assert the violation of any personal rights under governing Church documents. Pet. App. 9a-10a. The premise of the

petition is therefore faulty—indeed, it is an exercise in deception. Not one of the constitutional issues asserted by petitioners is actually raised by the decision below.

Furthermore, this case satisfies none of the traditional criteria for certiorari. The question of what rights petitioners have is determined under Church documents which, petitioners acknowledge, are interpreted under Massachusetts law. Pet. 26-28. Massachusetts courts have repeatedly held that these documents create no personal rights in Church members to vote or otherwise to participate in the management or operations of the Church organization. Pet. App. 9a-10a. Petitioners admit that courts in other jurisdictions must apply Massachusetts law when they are called on to interpret Church documents, so no conflict could ever develop on this state law issue. Pet. 27. And petitioners have not even attempted to identify any conflict between state supreme courts on any federal issue. The cases from other jurisdictions that petitioners allege to be in conflict with the Supreme Judicial Court's ruling (Pet. 24-26) turn on state standing law, not federal constitutional law. Moreover, none of these cases reaches a result different from the one here on any factually similar record; each decision acknowledges the same basic principles of standing law.

Petitioners concede that questions of standing require "case-by-case assessment" of the facts and circumstances. Pet. 22. Interpretation of the foundational documents of this particular Church and evaluation of the fact-bound question whether petitioners have standing are obviously not proper subjects for this Court's review. This Court does not grant certiorari to second guess opinions of state supreme courts on the meaning of trusts, wills, and by-laws, or to review routine applications of state-law rules of standing.

Review is also unwarranted because petitioners' suit asks the courts to exercise authority over matters of internal Church governance in a manner that would plainly violate the

First Amendment. Petitioners would have the courts reallocate decisionmaking authority and reengineer Church polity by overruling The Christian Science Board of Directors' determinations under the Church's divinely inspired foundational documents. This Court's precedents make clear that civil courts may not constitutionally interfere in matters of church government by overriding the views of a church body vested with final authority to interpret a church's governing documents. *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94 (1952); *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976). Ultimately, therefore, petitioners could not prevail in their suit even if they were accorded standing.

I. The Federal Constitutional Questions Were Neither Properly Raised By Petitioners In The Court Below Nor Addressed By That Court In Its Opinion.

Petitioners contend that the principles of state standing law on which the decision below rested violate the First and Fourteenth Amendments to the United States Constitution. Pet. i. But that argument was not raised by petitioners in Superior Court, or on a timely basis on appeal; nor was any federal issue addressed by the Supreme Judicial Court. The petition should therefore be denied for want of a properly presented federal question. 28 U.S.C. § 1257; see *Adams* v. *Robertson*, 117 S. Ct. 1028, 1029 (1997); *Hill* v. *California*, 401 U.S. 797, 805 (1971); Robert L. Stern, et al., *Supreme Court Practice* §§ 3.15-3.17, at 116-130 (7th ed. 1993) (hereinafter cited as "Stern & Gressman").

For purposes of invoking this Court's certiorari jurisdiction to review the decision of a state court, the litigant must have "specially set up or claimed" a federal title, right, privilege, or immunity (28 U.S.C. § 1257), in a timely and proper manner, in accordance with the applicable state procedural law. *Adams*, 117 S. Ct. at 1030; *Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 181 n.3 (1983); *Michel* v. *Louisiana*, 350 U.S. 91, 93 (1955); Stern & Gressman, *supra*, at

117. Where, as here, the highest state court has failed to pass upon a federal question, "it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Board of Dirs. of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) (citations omitted); see also *Adams*, 117 S. Ct. at 1029. Petitioners have made no such showing; indeed, they have ignored the jurisdictional issue.

Rule 14.1(g)(i) of this Court's Rules requires a petitioner seeking review of a state court decision to specify in the statement of the case "the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts." Despite being filed by experienced counsel, the petition does not even attempt to comply with Rule 14.1(g)(i). The petition's sole reference to the presentation or disposition of the federal question is a brief reference on page 16 of the petition, which fails to satisfy the Rule in several respects: (1) it makes no mention of whether or how the federal question was raised in the court of first instance, (2) it does not explain the method or manner in which the question was raised, and (3) it does not describe the way in which the federal question was passed upon by either the court of first instance or the appellate court. If there is any reason to justify petitioners' procedural default, petitioners should have set it forth in the petition so that respondents would have an opportunity to respond.

Massachusetts decisions consistently hold that issues not presented and resolved at the trial level need not be considered on appeal. *E.H.S.* v. *K.E.S.*, 676 N.E.2d 449, 450 (Mass. 1997); *Royal Indemnity Co.* v. *Blakely*, 360 N.E.2d 864, 865 (Mass. 1977). See, e.g., *Commissioner of Correction* v. *McCabe*, 576 N.E.2d 654, 656 n.7 (Mass. 1991)

("This issue was not raised in the Superior Court; it is not properly before us"); *Moloney* v. *Boston Five Cents Savings Bank FSB*, 663 N.E.2d 811, 815 (Mass. 1996) ("We do not generally reach issues not discussed below"). This rule applies with equal force to constitutional arguments. See *E.H.S.*, 676 N.E.2d at 450; *Sugarman* v. *Board of Registration*, 662 N.E.2d 1020, 1026 (Mass. 1996); *Axelrod* v. *Board of Assessors*, 466 N.E.2d 517, 520 (Mass. 1984). A narrow exception exists only where a party did not have an opportunity to present an issue to the lower court and where it was fully briefed and argued on appeal by the parties (*Atlas Tack Corp.* v. *DiMasi*, 637 N.E.2d 230, 233 (Mass. App. 1994))—neither of which prerequisites is even arguably satisfied here.

Throughout this case, the issue of standing was litigated solely as a question of state law. In the Superior Court, petitioners made no mention of any possible federal constitutional bar to application of Massachusetts standing law. This was not for want of opportunity. Respondents made the standing argument both in a motion to dismiss and again in a motion for summary judgment, relying on the same reasoning and the same precedents that later informed the decision of the Supreme Judicial Court. If petitioners believed that acceptance of those arguments would lead to a violation of the United States Constitution, they were obligated under well-established Massachusetts law to raise the objection on a timely basis so that the Superior Court would be able to address it. *E.H.S.*, 676 N.E.2d at 450; *McCabe*, 576 N.E.2d at 656 n.7; see, *e.g.*, *Rotary Club*, 481 U.S. at 550; *Beck* v. *Washington*, 369 U.S. 541, 550 (1962).

In the Supreme Judicial Court, petitioners devoted 13 pages of their brief to the standing issue without even mentioning any supposed federal constitutional claim or citing any federal decision. See Brief for Plaintiffs-Appellees, at 36-49. Every case they cited was a Massachusetts case,

relying solely on state law. Petitioners did not see fit to mention any of the non-Massachusetts cases they now claim are in "conflict" with the decision below. Their argument was based entirely on interpretation of Church documents, which they concede is governed by state, not federal, law. Pet. 2 ("construction of the documents governing The Mother Church will always involve Massachusetts law"). Neither their statement of issues presented for review, their table of contents, nor their argument gave any indication of a federal constitutional dimension to the standing question.

Only on page 49 of their brief in the Supreme Judicial Court, in the section of their brief styled "Conclusion," did petitioners make any reference to a federal right. This was little more than a rhetorical flourish, without explanation or elaboration. It was not sufficient to put anyone on notice that they were making a constitutional argument, still less to provide notice of the substance of a constitutional contention. See *Adams*, 117 S. Ct. at 1030-1031 & n.3 ("passing invocations" of federal rights in briefs to state supreme court are insufficient to preserve federal issue for this Court's review); *Rotary Club*, 481 U.S. at 550 n.9 (a "casual reference to a federal case" is "insufficient to inform a state court that it has been presented with a [federal] claim"). Even then, petitioners did not mention the Equal Protection or Due Process Clauses, which are invoked in the petition at 20-21. As a matter of Massachusetts law, petitioners' fleeting and generalized statement in their "Conclusion" was insufficient to raise the issues they now ask this Court to rule upon. *Sugarman*, 662 N.E.2d at 1026 (First Amendment argument was not "adequately raised" by "a one-page conclusory statement"); *Commonwealth* v. *Doe*, 544 N.E.2d 860, 863 (Mass. 1989). The complete absence of any discussion of or reference to federal constitutional issues in the thorough opinion of the Supreme Judicial Court confirms that it did not find any such issues to be properly raised by petitioners.

To be sure, petitioners raised the federal question, after a fashion, in their petition for rehearing. But it is well settled that this is insufficient unless the state court actually entertains the petition and expressly decides the question. *Adams*, 117 S. Ct. at 1031 n.3; *Rotary Club*, 481 U.S. at 550. There is an exception to this rule if the federal question is generated by an unexpected decision of the highest state court, giving the litigant no prior opportunity to anticipate or assert the particular federal question. *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 85 n.9 (1980); Stern & Gressman, *supra*, at 129. Here, however, petitioners can claim no surprise. The standing issue was explicitly raised in the motion to dismiss, the motion for summary judgment, the petition for interlocutory review, and the opening brief of respondents in the Supreme Judicial Court. That court's decision was based on "well-settled principles of law long enforced by [the Supreme Judicial Court]." Pet. App. 3a. Indeed, this is at least the fourth time in this century that the Supreme Judicial Court has held that members of The First Church of Christ, Scientist, lack standing to assert claims for judicial intervention in the governance of the Church. See *Krauthoff* v. *Attorney General*, 132 N.E. 865, 865-866 (Mass. 1921); *Eustace* v. *Dickey*, 132 N.E. 852, 864 (Mass. 1921); *Chase* v. *Dickey*, 99 N.E. 410, 416 (Mass. 1912). If petitioners believed this well-established line of cases, explicitly invoked by respondents, raised a federal constitutional question, they had every opportunity to say so.

Petitioners' presentation of the federal issue therefore was defective on two independent grounds: failure to raise the issue at all in the Superior Court, and failure to raise it properly in the Supreme Judicial Court. "In these circumstances, it would have been perfectly reasonable"—indeed, standard practice under Massachusetts law—"for [the Supreme Judicial Court] to conclude that the * * * federal claim was not before it." *Adams*, 117 S. Ct. at 1031. Petitioners have failed to rebut the presumption that the

Supreme Judicial Court did not pass upon the federal issue because "the issue was not properly presented" (*id.* at 1029; *Rotary Club*, 481 U.S. at 550), and the petition should therefore be denied for want of a properly presented federal question.

II. The Constitutional Questions Raised By The Petition Are Entirely Spurious.

In addition—even apart from the procedural default discussed in Section I—the petition for certiorari should be denied because it is frivolous. It is based on a tortured misstatement of the holding of the Supreme Judicial Court. That decision rested entirely on state law, and raises no federal question.

The premise of the petition is that the holding of the Supreme Judicial Court "discriminates unconstitutionally among [religious] adherents based upon the very structure of internal governance of the church to which they belong" by "decreeing that a church member who is aggrieved by a governance violation has standing where he or she has been denied a right to *vote* conferred by a church by-law * * *, *but* that church members have *no* standing when they are aggrieved by a governance violation that infringes upon *other* kinds of specific, church by-law-conferred personal rights." Pet. 19 (emphases in original).

That premise is false—and obviously so. The court below did not discriminate among religious bodies and adherents, but instead applied a rule of standing that is equally applicable to all churches and charities: viz., that only the Attorney General has standing to bring suit to ensure proper governance. Pet. App. 8a.[8/] Nor did the court discriminate between voting rights and other personal rights.

[8/] Petitioners concede that "the rule adopted by the S.J.C. purports to apply to all public charities." Pet. 22.

The court held that an individual member of a charity may sue only to vindicate a personal right "such as" the right to vote, but has no standing to raise generalized claims of corporate mismanagement. Pet. App. 9a.

Even if petitioners had a right to vote, this case would have come out the same way. In *Lopez* v. *Medford Community Center, Inc.*, 424 N.E.2d 229 (Mass. 1981), cited and discussed by the court below at Pet. App. 9a, the Supreme Judicial Court granted members of a charitable organization standing to challenge the corporation's refusal to allow them to vote, but denied them standing to make claims of corporate "mismanagement." As the court below observed, the corporate mismanagement claims rejected in *Lopez* are "similar to those made here" (Pet. App. 9a), and they received the same treatment, notwithstanding the fact that the plaintiffs in *Lopez* had a right to vote.

Petitioners' real quarrel with the Supreme Judicial Court is that the court ruled that they have not demonstrated the violation of any "personal right that directly affects [them]." Pet. App. 9a-11a. That conclusion, however, raises no federal issue: it is simply a fact-bound application of state law to the circumstances of this case, as revealed in the complaint and in the governing documents of the Church, which, petitioners concede, "must be construed according to Massachusetts law." Pet. 26.

Although petitioners attempt to cast their complaint as one involving personal rights "to participate in church governance" (Pet. 19), the complaint and the Church's governing documents make clear that no such rights are involved in this case. Count I of the complaint asks for a determination of the relative powers of the Board of Directors and the Committee on Finance, with no allegation that petitioners have ever served on either body. The dismissal of count II has not been appealed. Count III is a claim that the communications mission of the Church should be viewed as

an unduly "speculative" investment, and that the Publishing Society improperly incurred liabilities beyond its ability to pay. Count IV asks for a judicial accounting of Church finances. None of these counts makes any reference to the personal rights of petitioners, and the court below, based on a careful examination of Church governing documents, concluded that petitioners have "no enforceable legal interest in the administration of the charity, and have no standing to pursue such claims." Pet. App. 11a.

Petitioners offer the Court a grab-bag of constitutional claims. See Pet. 20-24. But since all of them are predicated on the same misconstruction of the holding of the Supreme Judicial Court, all are irrelevant. Petitioners contend, first, that the Massachusetts standing rule "discriminates in providing access to courts based on the way in which one has exercised his or her Free Exercise right of religious association." Pet. 20. This, they say, violates due process and equal protection. Under an accurate reading of the decision below, however, there is no such "discrimination." No individual member has standing to sue a public charity over alleged mismanagement, unless he or she has thereby been deprived of a specific "personal right," which petitioners have not alleged. Pet. App. 9a; see *Lopez*, *supra*. This ordinary rule of standing applies to *all* churches and *all* public charities, whatever their form of organization. There is no unequal access to the courts, and thus no due process or equal protection issue.[2/]

[2/] Petitioners rely upon a line of this Court's decisions culminating in *M.L.B.* v. *S.L.J.*, 117 S. Ct. 555 (1996), which prohibits a state from conditioning an indigent's access to court on the payment of fees or charges, or from discriminatorily imposing fees on only a narrow class of litigants. Pet. 20-21. These decisions are not even remotely relevant. Under the neutral standing principles applied by the Supreme Judicial Court, petitioners have no standing to challenge management of the Church's finances because (unlike the

Second, petitioners contend that the decision below is a "direct" violation of the Free Exercise and Establishment Clauses because it denies members of the Church the ability to enforce "legal obligations" through the civil courts. Pet. 21. Again, this is a blatant mischaracterization of the holding below. The court did not deny anyone the right to enforce "legal obligations"; the court held that under Massachusetts law these petitioners do not possess any personal rights that a court could enforce.

Third, petitioners contend that the decision below "has altered the Church from the one envisioned by Mrs. Eddy * * * to one with an all-powerful, self-perpetuating Board of Directors." Pet. 23. But the decision below does no such thing. It simply limits standing to sue to the Attorney General, for the entirely legitimate purpose of "protecting public charities from being called upon to answer to proceedings instituted by individuals, with or without just cause, who have no private interests distinct from those of the public." *Dillaway* v. *Burton*, 153 N.E. 13, 16 (Mass. 1926).

Finally, petitioners claim that the Massachusetts standing rule "discriminates among religions." Pet. 23. This claim is based on petitioners' false assertion that the decision below treats voting rights differently from other personal rights. Nothing in the court's opinion supports that interpretation. Standing to sue does *not* depend on "the form of personal rights to participate in church governance," but on whether the plaintiffs have been denied any "personal right" at all.

There is no federal issue in the case.

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litigants in the cases cited in the petition) they have no personal rights at stake in this litigation. Their interests are protected by the Attorney General of the Commonwealth of Massachusetts.

III. Prudential Considerations Also Caution Against Granting The Petition.

Even if there were a properly presented federal question, this case is completely uncertworthy. Furthermore, to decide the case on the merits would entangle the Court in the internal affairs of the Church, in violation of the First Amendment.

As is evident from a reading of the decision below, this case turned entirely on the particular facts and allegations of the complaint and the court's unexceptional interpretation of Church documents. Notwithstanding petitioners' rhetoric about the Supreme Judicial Court's "novel and unprecedented" standing rule (Pet. 27), which, they say, "alter[s]" and even "nullif[ies]" the Church's governing structure (Pet. 23, 28), the decision below is entirely consistent with numerous prior decisions regarding the structure of The First Church of Christ, Scientist, as well as other charities. On at least four occasions in the past, the court has recognized the final authority of The Christian Science Board of Directors over the affairs of the Church and the lack of any personal interest on the part of members to sue over governance issues. *Dittemore* v. *Dickey*, 144 N.E. 57, 61 (Mass. 1924); *Eustace* v. *Dickey*, 132 N.E. 852, 860 (Mass. 1921); *Krauthoff* v. *Attorney General*, 132 N.E. 865 (Mass. 1921); *Chase* v. *Dickey*, 99 N.E. 410, 411-412 (Mass. 1912).

The decision below is consistent with these prior decisions of the Supreme Judicial Court and with the authoritative determinations of the Board of Directors, which is the only body authorized under the *Church Manual* to finally resolve matters of Church governance. Far from "effectively abolish[ing] the church created by the Founder of Christian Science, and establish[ing] in its place a new one" (Pet. 2), the decision below respects and preserves Mary Baker Eddy's divinely inspired form of government for her Church.

Moreover, as petitioners acknowledge, the merits of standing claims necessarily involve a case-by-case examination of particular facts, which would be of little value to other courts or litigants. See Pet. 22 ("[d]etermining whether there is standing of course requires a case-by-case assessment of the interests alleged to be infringed"). This Court obviously should not grant certiorari to resolve such fact-bound issues, which turn on the construction of the *Church Manual*, trust deeds, and wills—and which could have no general precedential importance.

Petitioners' assertion of a conflict with the courts of other jurisdictions is frivolous. First, there can be no conflict among the lower courts over the meaning of Massachusetts law. Only the Supreme Judicial Court can settle such issues. It would be a matter of no moment if different states had adopted different rules of standing for litigation regarding charitable organizations. In addition, the supposed conflict here is nonexistent. The rule of standing applied below—limiting standing to challenge alleged misgovernance of charitable organizations to the Attorney General—is typical of that applied throughout the United States. See, *e.g.*, *Carl J. Herzog Found.* v. *University of Bridgeport*, 699 A.2d 995, 997-998 (Conn. 1997); *Hinton* v. *City of St. Joseph*, 889 S.W.2d 854, 858 (Mo. App. 1994); *In re De Long*, 565 N.Y.S.2d 569, 570 (App. Div. 1991); *Nacol* v. *Texas*, 792 S.W.2d 810, 812 (Tex. App. 1990); *Hardman* v. *Feinstein*, 240 Cal. Rptr. 483, 485 (App. 1987); IVA Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 391, at 370-373 (4th ed. 1989); *Restatement (Second) of Trusts* § 391 & comment c (1959).

The state court decisions cited by petitioners (Pet. 24-26) rest on the same general standing principles—derived from the same trust law doctrines—that were applied by the Supreme Judicial Court in this case and in *Lopez*, and on a fact-specific inquiry into the "interests alleged to be

infringed." Pet. 22. In each case, the court determined that the party asserting standing had a direct and special interest recognized by state law—a "personal right" in the terminology employed by the Supreme Judicial Court—in the property in dispute in the litigation. In none of the cases alleged by petitioners to create a "conflict" were the facts remotely similar to those involved here.

In one group of cases cited by petitioners, the would-be litigant's personal right derived from a trusteeship or official position held in the church. See *Gray* v. *St. Matthews Cathedral Endowment Fund, Inc.*, 544 S.W.2d 488, 491 (Tex. Civ. App. 1976) (appellant had standing "to intervene in existing litigation [to which] the attorney general is a party," where he was "a former Vestryman who remains contingently liable for certain debts of the parish" and a trustee under articles and by-laws "which were rescinded by the settlement of which he complains"); *United Church of God, Inc.* v. *McLendon*, 344 S.E.2d 373, 375 (N.C. App. 1986) ("a duly appointed trustee" of a church had standing to "maintain [an] action as a trustee for the recovery of property which was originally deeded to that church"). In another group of cases, the courts determined that, in the particular circumstances, members of a congregation were beneficiaries of a trust with a direct interest in the disputed property. Thus, in *Mt. Jezreel Christians Without A Home* v. *Board of Trustees*, 582 A.2d 237, 239 (D.C. 1990), members of a congregation were the beneficiaries of a trust created "for the purpose of * * * holding * * * services at the church building on the southeast corner of Fifth Street and E Street," and as such had standing to sue to challenge church trustees' closure and sale of that church building. The small size of a congregation has also led some courts to the conclusion that each member of the congregation had a certain and definite interest in the enforcement of the trust. See *Crocker* v. *Stevens*, 435 S.E.2d 690, 693-695 (Ga. App. 1993) (members of a 23-person congregation had standing to

petition for dissolution of the nonprofit corporation and disposition of its assets after church ceased operation); see also *Gray*, 544 S.W.2d at 491 (trust was for the benefit of the Cathedral's parishioners, who were "a small, easily identifiable group").

Petitioners in this case, by contrast, "have never held office in the Church, nor are they directors of the Church or trustees of the Publishing Society." Pet. App. 7a. Church membership is large and international in scope; and the *Church Manual* establishes for the Church a unique governing structure. See Joint App. 325; Pet. 13; *supra*, at pages 2-3. And after reviewing the 1892 and 1898 deeds of trust and Mary Baker Eddy's will, the Supreme Judicial Court determined "that individual members of the Church are not 'beneficiaries'" of those instruments in any legal sense and confirmed earlier decisions that no member of the Church has been granted personal rights in Church property. Pet. App. 10a.

Furthermore, for the civil courts to assume jurisdiction to decide this case on the merits would itself violate the First Amendment. As this Court has repeatedly held, churches have the right to establish, interpret, and enforce their own rules of governance, without interference from civil authorities. *Presbyterian Church* v. *Hull Memorial Presbyterian Church*, 393 U.S. 440, 448 (1969); *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952); see Laurence H. Tribe, *American Constitutional Law* 1241 (2d ed. 1988) (in "disputes over religious doctrine, administration, or organization—a civil court can discharge its duty in only one way: by

accepting the decisions of the proper church authorities as it finds them").[10/]

A civil court may not "substitut[e] its interpretation of the [church] constitutions for that of the highest ecclesiastical tribunals in which church law vests authority to make that interpretation. This the First and Fourteenth Amendments forbid." *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 721-722 (1976); accord *Jones* v. *Wolf*, 443 U.S. 595, 604, 609 nn.7 & 8 (1979). In this Church, the tribunal vested with final authority to interpret and enforce the *Church Manual* is The Christian Science Board of Directors. The First Amendment does not permit courts to second guess this authoritative governing body on issues of Church governance or doctrine.

Nor would it be constitutional for a civil court to second guess the wisdom of expenditures made by the Church to spread its message to the world. Petitioners claim that the Church's expanded communications program was "imprudent" (Pet. 12) and that these expenditures should be treated as an "investment" rather than as part of the communications mission of the Church. These questions are not appropriate for civil adjudication. Churches have the constitutionally protected right "to define and carry out their religious

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[10/] This principle, which originally was recognized as part of the federal common law, became constitutional doctrine in the 1950s. That explains why earlier decisions of the Supreme Judicial Court sometimes resolved cases involving internal church organization, rather than deferring to the highest church tribunal. See cases cited at Pet. 28-29. Since, in every case involving this Church, the court upheld the determinations of the Directors under Church documents, there was no practical difference. In this case, petitioners ask the courts to interfere with internal organization by overruling the judgment of the Directors regarding the meaning of the Church's inspired governing documents. That truly would be unprecedented.

missions." *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327, 339 (1987). This includes the right to determine spending priorities without interference from the state. See *Lemon* v. *Kurtzman*, 403 U.S. 602, 621-622 (1971); *Rizzuto* v. *Rematt*, 653 N.E.2d 34, 35-38 (Ill. App. 1995) ("It is eminently clear that the basis of this lawsuit is to have the courts examine the way the Church is managing its financial affairs; to substitute the prudence of a court's judgment for that of the Trustee and Archbishop who is entrusted by Church doctrine to exercise such judgment; [and] to impose court supervision over all financial matters of an entire religious faith. * * * These matters, however, are beyond the realm of judicial jurisdiction"); *Basich* v. *Board of Pensions*, 540 N.W.2d 82, 85-88 (Minn. App. 1995) (holding that a civil court may not evaluate the prudence of a church's administration of its pension fund where investment decisions were made, in part, on the basis of the moral and religious aims of the church).

Precisely for these reasons, a national coalition of eighteen church and other organizations interested in preserving religious liberty filed an *amicus* brief in support of the Church in the court below.[11/] *Amici* objected that a court's

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[11/] The signatories to the *amicus* brief were Americans United for Separation of Church and State; American Jewish Congress; General Assembly of the Presbyterian Church (U.S.A.); Baptist Joint Committee on Public Affairs; The Church of Jesus Christ of Latter-Day Saints; Church of the Nazarene; The Christian Legal Society; The Episcopal Diocese of Massachusetts, Inc.; Evangelical Lutheran Church in America; General Conference of Seventh-Day Adventists; Massachusetts Council of Churches; The National Association of Evangelicals; The National Council of the Churches of Christ in the U.S.A.; The New England Conference of the United Methodist Church; The Reorganized Church of Jesus Christ of Latter-Day Saints; Unitarian Universalist Association; The United States Catholic Conference; and Worldwide Church of

consideration of the merits of petitioners' claims "would chill free exercise by other religious organizations" and "be devastating to religious liberty" because "[c]hurches can have no prophetic voice if every controversial expenditure is subject to judicial review." Brief *amicus curiae* of Americans United for Separation of Church and State, et al., at 21-22.

Petitioners contend that "civil courts are permitted to resolve disputes over church polity and administration * * * so long as doing so does not require resolution of 'underlying controversies over religious doctrine.'" Pet. 29. However, this Court has long held that churches have the constitutional right to "decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff*, 344 U.S. at 116; see also *Serbian*, 426 U.S. at 710 (the Constitution bars judicial inquiry into "church polity and church administration"). In cases where different church governing bodies have colorable competing claims to church property, it is sometimes necessary for civil courts to examine church governing documents to the extent necessary to determine which of the competing claimants has authority to speak for the church. But it would violate the First Amendment for civil courts to second guess the interpretations of The Christian Science Board of Directors—the body charged by the *Church Manual* with responsibility for finally resolving all questions of compliance with the *Manual*—at the behest of individual members with a contrary view of how the Church should be governed.

This Court should avoid those constitutional pitfalls by allowing the Supreme Judicial Court's decision to stand.

God. A copy of the *amicus* brief has been lodged with the Clerk for the Court's convenience.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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